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FACEBOOK, INC.
8

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 SAN FRANCISCO DIVISION
12

13 DANIEL M. MILLER,

14 Plaintiff,

15 v.

16 FACEBOOK, INC. and YAO WEI YEO,

17 Defendants.
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Case No. 3:10-CV-00264 (WHA)

**FACEBOOK, INC.'S ANSWER TO
SECOND AMENDED COMPLAINT
AND COUNTERCLAIMS**

DEMAND FOR JURY TRIAL

Judge: Honorable William Alsup

1 Defendant Facebook, Inc. ("Facebook") answers the Second Amended Complaint filed by
2 Daniel M. Miller ("Miller") as follows:

3 **THE PARTIES**

4 1. Facebook lacks sufficient information to admit or deny and on that basis denies the
5 allegations of Paragraph 1 that Miller resides in Marietta, Georgia.

6 2. Facebook admits that it is a Delaware corporation with its principal place of
7 business at 1601 S. California Avenue, Palo Alto, California 94304. Except as expressly
8 admitted, Facebook lacks sufficient information to admit or deny and on that basis denies the
9 allegations of Paragraph 2.

10 3. Facebook lacks sufficient information to admit or deny and on that basis denies the
11 allegations of Paragraph 3 that Defendant Yeo is an individual with unknown address that was not
12 ascertainable after reasonable diligence.

13 **JURISDICTION AND VENUE**

14 4. Facebook neither admits nor denies the allegations contained in Paragraph 4
15 because those allegations are conclusions of law to which no response is required. To the extent
16 those allegations may be deemed allegations of fact, Facebook denies the allegations of Paragraph
17 4.

18 5. Facebook neither admits nor denies the allegations contained in Paragraph 5
19 because those allegations are conclusions of law to which no response is required. To the extent
20 those allegations may be deemed allegations of fact, Facebook lacks sufficient information to
21 admit or deny and on that basis denies the allegations of Paragraph 5.

22 6. Facebook neither admits nor denies the allegations contained in Paragraph 6
23 because those allegations are conclusions of law to which no response is required. To the extent
24 those allegations may be deemed allegations of fact, Facebook lacks sufficient information to
25 admit or deny and on that basis denies the allegations of Paragraph 6.

26 7. Facebook admits that it does business in the state of California, including within
27 the Northern District of California. Except as expressly admitted, Facebook denies the
28 allegations of Paragraph 7.

1 8. Facebook lacks sufficient information to admit or deny and on that basis denies the
2 allegations of Paragraph 8.

3 **FACTUAL BACKGROUND**

4 9. Facebook neither admits nor denies the allegations contained in Paragraph 9 as it
5 has no personal knowledge of when or if Plaintiff authored the *Boomshine* video game.

6 10. Facebook neither admits nor denies the allegations contained in Paragraph 10
7 because those allegations are not factual allegations asserted against Facebook. To the extent
8 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
9 sufficient information to admit or deny and on that basis denies the allegations contained in
10 Paragraph 10.

11 11. Facebook neither admits nor denies the allegations contained in Paragraph 11
12 because those allegations are not factual allegations asserted against Facebook. To the extent
13 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
14 sufficient information to admit or deny and on that basis denies the allegations contained in
15 Paragraph 11.

16 12. Facebook neither admits nor denies the allegations contained in Paragraph 12
17 because those allegations are not factual allegations asserted against Facebook. To the extent
18 those allegations may be deemed allegations of fact asserted against Facebook, Facebook admits
19 that a copyright registration on *Boomshine*, a computer file, with Registration Number
20 TX0007089855 exists. Facebook denies that the copyright registration was duly and lawfully
21 granted because, among other things, other chain reaction type games identical or substantially
22 similar to *Boomshine* were available at least as early as 2005. Except as expressly admitted or
23 denied, Facebook lacks sufficient information to admit or deny and on that basis denies the
24 allegations contained in Paragraph 12.

25 13. Facebook neither admits nor denies the allegations contained in Paragraph 13
26 because those allegations are not factual allegations asserted against Facebook. To the extent
27 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
28 sufficient information to admit or deny and on that basis denies the allegations contained in

1 Paragraph 13.

2 14. Facebook denies that it hosted an application titled *ChainRxn*. Except as expressly
3 denied, Facebook neither admits nor denies the allegations contained in Paragraph 14 because
4 those allegations are not factual allegations asserted against Facebook. To the extent those
5 allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
6 sufficient information to admit or deny and on that basis denies the allegations contained in
7 Paragraph 14.

8 15. Facebook neither admits nor denies the allegations contained in Paragraph 15
9 because those allegations are not factual allegations asserted against Facebook. To the extent
10 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
11 sufficient information to admit or deny and on that basis denies the allegations contained in
12 Paragraph 15.

13 16. Facebook neither admits nor denies the allegations contained in Paragraph 16
14 because those allegations are not factual allegations asserted against Facebook and Facebook has
15 no personal knowledge of how or if Defendant Yeo created or published an application titled
16 *ChainRxn*. To the extent those allegations may be deemed allegations of fact asserted against
17 Facebook, Facebook lacks sufficient information to admit or deny and on that basis denies the
18 allegations contained in Paragraph 16.

19 17. Facebook admits that until sometime after the initial filing of this action on
20 October 9, 2009, an application titled *ChainRxn* was available through Facebook's Platform and
21 that the uniform resource locator for the application's canvas page was
22 www.facebook.com/zwigglers. Except as expressly admitted, Facebook denies the allegations
23 contained in Paragraph 17.

24 18. Facebook admits that until sometime after the initial filing of this action on
25 October 9, 2009, an application titled *ChainRxn* was available through Facebook's Platform and
26 that the uniform resource locator for the application's canvas page was
27 www.facebook.com/zwigglers. Except as expressly admitted, Facebook denies the allegations
28 contained in Paragraph 18.

1 19. Facebook denies the allegations contained in Paragraph 19.

2 20. Facebook neither admits nor denies the allegations contained in Paragraph 20
3 because those allegations are not factual allegations asserted against Facebook. To the extent
4 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
5 sufficient information to admit or deny and on that basis denies the allegations contained in
6 Paragraph 20.

7 21. Facebook admits that its Statement of Rights and Responsibilities (“SRR”), among
8 other things, permits Facebook to remove content or information posted on Facebook. Except as
9 expressly admitted, Facebook lacks sufficient information to admit or deny and on that basis
10 denies the allegations contained in Paragraph 21.

11 22. Facebook admits that its SRR, among other things, permits it to disable an
12 account, when appropriate, for repeated infringement of intellectual property rights. Except as
13 expressly admitted, Facebook lacks sufficient information to admit or deny and on that basis
14 denies the allegations contained in Paragraph 22.

15 23. Facebook denies the allegations contained in Paragraph 23.

16 24. Facebook denies the allegations contained in Paragraph 24.

17 25. Facebook neither admits nor denies the allegations contained in Paragraph 25
18 because those allegations are not factual allegations asserted against Facebook. To the extent
19 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
20 sufficient information to admit or deny and on that basis denies the allegations contained in
21 Paragraph 25.

22 26. Facebook lacks sufficient information to admit or deny and on that basis denies the
23 allegations contained in Paragraph 26.

24 27. Facebook denies the allegations contained in Paragraph 27.

25 28. Facebook denies the allegations contained in Paragraph 28.

26 29. Facebook denies the allegations contained in Paragraph 29.

27 30. Facebook denies the allegations contained in Paragraph 30.

28 31. Facebook neither admits nor denies the allegations contained in Paragraph 31

1 because those allegations are not factual allegations asserted against Facebook. To the extent
2 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
3 sufficient information to admit or deny and on that basis denies the allegations contained in
4 Paragraph 31.

5 32. Facebook neither admits nor denies the allegations contained in Paragraph 32
6 because those allegations are not factual allegations asserted against Facebook. To the extent
7 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
8 sufficient information to admit or deny and on that basis denies the allegations contained in
9 Paragraph 32.

10 33. Facebook denies the allegations contained in Paragraph 33.

11 34. Facebook denies the allegations contained in Paragraph 34.

12 **COUNT ONE**

13 **Copyright Infringement by Defendant Yeo**

14 35. Facebook refers to and incorporates its responses set forth above to each and every
15 allegation in Paragraphs 1-34 as if fully set forth herein.

16 36. Facebook neither admits nor denies the allegations contained in Paragraph 36
17 because those allegations are not factual allegations asserted against Facebook. To the extent
18 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
19 sufficient information to admit or deny and on that basis denies the allegations contained in
20 Paragraph 36.

21 37. Facebook neither admits nor denies the allegations contained in Paragraph 37
22 because those allegations are not factual allegations asserted against Facebook. To the extent
23 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
24 sufficient information to admit or deny and on that basis denies the allegations contained in
25 Paragraph 37.

26 38. Facebook neither admits nor denies the allegations contained in Paragraph 38
27 because those allegations are not factual allegations asserted against Facebook. To the extent
28 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks

1 sufficient information to admit or deny and on that basis denies the allegations contained in
2 Paragraph 38.

3 39. Facebook neither admits nor denies the allegations contained in Paragraph 39
4 because those allegations are not factual allegations asserted against Facebook. To the extent
5 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
6 sufficient information to admit or deny and on that basis denies the allegations contained in
7 Paragraph 39.

8 40. Facebook neither admits nor denies the allegations contained in Paragraph 40
9 because those allegations are not factual allegations asserted against Facebook. To the extent
10 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
11 sufficient information to admit or deny and on that basis denies the allegations contained in
12 Paragraph 40.

13 41. Facebook neither admits nor denies the allegations contained in Paragraph 41
14 because those allegations are not factual allegations asserted against Facebook. To the extent
15 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
16 sufficient information to admit or deny and on that basis denies the allegations contained in
17 Paragraph 41.

18 42. Facebook neither admits nor denies the allegations contained in Paragraph 42
19 because those allegations are not factual allegations asserted against Facebook. To the extent
20 those allegations may be deemed allegations of fact asserted against Facebook, Facebook lacks
21 sufficient information to admit or deny and on that basis denies the allegations contained in
22 Paragraph 42.

23 **COUNT TWO**

24 **Contributory Copyright Infringement as to Defendant Facebook, Inc.**

25 43. Facebook refers to and incorporates its responses set forth above to each and every
26 allegation in Paragraph 1-42 as if fully set forth herein.

27 44. Facebook denies the allegations of Paragraph 44.

28 45. Facebook denies the allegations of Paragraph 45.

- 1 46. Facebook denies the allegations of Paragraph 46.
- 2 47. Facebook denies the allegations of Paragraph 47.
- 3 48. Facebook denies the allegations of Paragraph 48.
- 4 49. Facebook denies the allegations of Paragraph 49.
- 5 50. Facebook denies the allegations of Paragraph 50.
- 6 51. Facebook denies the allegations of Paragraph 51.

7 **AFFIRMATIVE DEFENSES**

8 Further answering the Second Amended Complaint, Facebook asserts the following

9 defenses. Facebook reserves the right to amend its Answer with additional defenses as further

10 information is obtained.

11 **First Defense**

12 Each of Miller's claims fails to state facts sufficient to constitute a cause of action.

13 **Second Defense**

14 Each of Miller's claims is barred by the doctrine of waiver.

15 **Third Defense**

16 Each of Miller's claims is barred by the doctrine of estoppel.

17 **Fourth Defense**

18 Each of Miller's claims is barred by the doctrine of unclean hands.

19 **Fifth Defense**

20 Miller's claim for Contributory Copyright Infringement as to Facebook is barred, in whole

21 or in part, because Miller failed to provide notice of the alleged copyright infringement as

22 required by contract.

23 **Sixth Defense**

24 Miller's claim for Contributory Copyright Infringement as to Facebook is barred, in whole

25 or in part, by contractual warranty disclaimers.

26 **Seventh Defense**

27 Miller's claim for Contributory Copyright Infringement as to Facebook is barred, in whole

28 or in part, by contractual limitations on liability.

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Eighth Defense

Miller is barred from recovering the damages against Facebook, in whole or in part, by contractual limitations on liability.

Ninth Defense

Each of Miller’s claims is barred by the doctrine of copyright misuse.

Tenth Defense

Each of Miller’s claims is barred by the doctrine of fraud on the Copyright Office.

Eleventh Defense

Each of Miller’s claims is barred by the doctrine of laches.

Twelfth Defense

Miller’s claim for Contributory Copyright Infringement as to Facebook is barred, in whole or in part, by the passive conduit exception to copyright infringement.

Thirteenth Defense

Miller’s claim for Contributory Copyright Infringement as to Facebook is barred, in whole or in part, by the safe harbor provisions of the DMCA, 17 U.S.C. § 512 (a)-(d).

Fourteenth Defense

Miller’s claim for Contributory Copyright Infringement as to Facebook is barred, in whole or in part, because he has not pursued his claims in good faith.

Fifteenth Defense

Each of Miller’s claims is barred, in whole or in part, because Defendants’ alleged actions come within the doctrine of fair use and/or de minimis copying of protectable elements, if any.

Sixteenth Defense

Each of Miller’s claims is barred, in whole or in part, because Miller’s alleged copyrighted work lacks originality.

Seventeenth Defense

Each of Miller’s claims is barred, in whole or in part, because Miller’s alleged copyrighted work constitutes nothing more than unprotectable scene a faire.

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Eighteenth Defense

Each of Miller’s claims is barred, in whole or in part, because Miller lacks standing to bring this action.

Nineteenth Defense

Each of Miller’s claims is barred, in whole or in part, because Miller has failed to prosecute this action and/or comply with court orders.

Twentieth Defense

Each of Miller’s claims is barred, in whole or in part, by licenses, express and implied, granted or authorized to be granted by Miller.

Twenty-first Defense

Each of Miller’s claims is barred, in whole or in part, because the accused work was independently created without reference to the claimed work.

Twenty-second Defense

Each of Miller’s claims is barred, in whole or in part, because the claimed work was abandoned.

Twenty-third Defense

Each of Miller’s claims is barred, in whole or in part, for failing to join indispensable parties.

Twenty-fourth Defense

Each of Miller’s claims is barred, in whole or in part, as Miller heretofore waived, licensed, abandoned or forfeited any rights in the claimed work.

Twenty-fifth Defense

Miller’s damages, if any, are limited by Facebook’s innocent intent.

Twenty-sixth Defense

Each of Miller’s claims is barred, in whole or in part, based on the doctrine of substantial non-infringing use, although Facebook submits that Miller bears the burden of proving the doctrine’s inapplicability.

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1 7. The SRR is a contractual agreement between Facebook and Counterdefendant.

2 8. During all relevant time periods, the SRR provided as follows:

3 Facebook respects the intellectual property rights of others. If you
4 believe your work has been copied in a way that constitutes
5 copyright infringement or are aware of any infringing material on
6 the Web site, please contact us at copyright@facebook.com.

6 In addition, the section entitled “Governing Law and Venue” of the SRR contains forum-
7 selection, choice of law, and personal jurisdiction clauses that state:

8 If there is any dispute about or involving the Web site and/or the
9 Service, you agree that the dispute will be governed by the laws of
10 the State of California without regard to its conflict of law
11 provisions. You also agree to the exclusive jurisdiction and venue
12 of the courts of the state and federal courts of Santa Clara County,
13 California and waive all defenses of lack of personal jurisdiction
14 and forum non conveniens. Any cause of action by you with
15 respect to the Web site and/or the service must be instituted within
16 one (1) year after the cause of action arose or be forever waived.

13 9. By virtue of accepting the SRR in order to utilize Facebook’s Services,
14 Counterdefendant agreed to abide by these provisions.

15 10. On information and belief, during all relevant times herein, Counterdefendant was
16 aware of these policies.

17 11. On October 9, 2009, Counterdefendant filed a complaint against Facebook and
18 Defendant Yeo in the Northern District of Georgia asserting causes of action for (1) copyright
19 infringement, (2) violation of the Lanham Act, and (3) unfair competition under the Georgia
20 Deceptive Trade Practices Act. The basis of the complaint was a “dispute about or involving the
21 Web site and/or the Service.”

22 12. On December 2, 2009, Facebook filed a Motion to Transfer Venue from the
23 Northern District of Georgia to the Northern District of California. Per the SRR, the action
24 should have been filed in the Northern District of California, not the Northern District of Georgia.

25 13. On January 15, 2010, the court granted Facebook’s Motion to Transfer Venue.

26 **FIRST CLAIM FOR RELIEF**
27 **(Breach of Contract)**

28 14. Facebook hereby realleges and incorporates by reference paragraphs 1 through 13,

1 inclusive, of this countercomplaint as though fully set forth herein.

2 15. Counterdefendant entered into a contract with Facebook on February 12, 2006.

3 16. The contract provides that any “dispute will be governed by the laws of the State
4 of California” with the “exclusive jurisdiction and venue [in] the courts of the state and federal
5 courts of Santa Clara County, California.”

6 17. Counterdefendant breached the agreement by filing his lawsuit in the Northern
7 District of Georgia making claims of alleged infringement of his intellectual property rights by
8 another Facebook user on Facebook’s networking internet service. In addition, Counterdefendant
9 breached the agreement by failing to notify Facebook of the alleged infringement pursuant to the
10 procedures outlined in the SRR.

11 18. Facebook has fulfilled all of its obligations under the contract and is not in breach
12 of the contract.

13 19. Counterdefendant’s breach of the agreement has caused damages to Facebook in
14 an amount to be determined at trial.

15 **SECOND CLAIM FOR RELIEF**
16 **(Breach of Contract)**

17 20. Facebook hereby realleges and incorporates by reference paragraphs 1 through 19,
18 inclusive, of this countercomplaint as though fully set forth herein.

19 21. On information and belief, on or about April 23, 2010, Counterdefendant created
20 an application entitled “Obechi” and made that application available through Facebook’s
21 Platform.

22 22. On information and belief, at least as early as April 23, 2010, Counterdefendant
23 agreed to Facebook’s Developer Principles & Policies (“DPP”) in connection with the Obechi
24 application.

25 23. Facebook’s DPP provide, among other things, that developers such as
26 Counterdefendant “must provide a link to [their] privacy policy and any other applicable policies
27 on every page of [their] application”; “must give users control over their data by posting a privacy
28 policy that explains what data [the developer] collect[s], and how [the developer] will use, store,

1 and/or transfer their data”; and “must not require users to grant additional permissions or add
2 Application Integration Points, and must only request extended permissions at reasonable times
3 when the user engages with features that would require the use.”

4 24. On information and belief, at least as early as December 7, 2009 to date,
5 Counterdefendant has failed to abide by the DPP.

6 25. Facebook has fulfilled all of its obligations under the DPP and is not in breach
7 thereof.

8 26. Counterdefendant’s breach of the DPP has caused damages to Facebook in an
9 amount to be determined at trial.

10 **THIRD CLAIM FOR RELIEF**

11 **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

12 27. Facebook hereby realleges and incorporates by reference paragraphs 1 through 26,
13 inclusive, of this countercomplaint as though fully set forth herein.

14 28. The law implies a covenant of good faith and fair dealing by which
15 Counterdefendant promised to perform fairly, honestly, and reasonably the terms encompassed in
16 the SRR and Facebook’s DPP.

17 29. Counterdefendant breached the implied covenant of good faith and fair dealing by
18 failing to notify Facebook of the alleged infringement through the means outlined in the SRR and
19 by filing a lawsuit in the Northern District of Georgia rather than in the Northern District of
20 California as required by the SRR.

21 30. Counterdefendant also breached the implied covenant of good faith and fair
22 dealing by failing to abide by the DPP and failing to adhere to its terms.

23 31. Counterdefendant’s acts frustrated the purpose of the SRR and the DPP (the
24 “Agreements”) and prevented Facebook from receiving the benefit of the Agreements, which was
25 to allow free access to Facebook’s networking website and platform by both individual users and
26 developers in order to promote and enhance communication, creativity, and interaction among
27 users.

28 32. Facebook has fulfilled its obligations under the Agreements and is not in breach of

1 the Agreements.

2 33. As a result of Counterdefendant's breach of the implied covenant of good faith and
3 fair dealing, Facebook has been damaged in an amount to be proven at trial.

4 **PRAYER FOR RELIEF**

5 WHEREFORE, based upon the foregoing, Facebook prays for the following relief:

6 1. That the Second Amended Complaint be dismissed with prejudice and that
7 Counterdefendant take nothing by way of his Second Amended Complaint;

8 2. An entry of judgment in favor of Facebook and against Counterdefendant on all
9 causes of action;

10 3. Compensatory, consequential, and incidental damages including, without
11 limitation, compensatory damages reasonably incurred by Facebook to transfer the action to
12 California as required by the SRR, in an amount according to proof at trial;

13 4. For costs of suit and attorneys' fees incurred herein;

14 5. Such other relief that the Court may deem proper.

15 **JURY DEMAND**

16 Facebook hereby demands a trial by jury for all issues so triable.

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18 Dated: August 9, 2010

ORRICK, HERRINGTON & SUTCLIFFE LLP

19
20 s/Thomas J. Gray/s

21 Thomas J. Gray
22 Attorneys for Defendant
23 FACEBOOK, INC.
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